STATE OF MICHIGAN

IN THE

SUPREME COURT

APPEAL FROM THE MICHIGAN COURT OF APPEALS
Wilder, P.J. and Holbrook, Jr. and McDonald, J.J.

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

Supreme Court
No. 118351

-vs-

JESSIE B. JOHNSON,

Defendant-Appellee.

Court of Appeals No. 219499
Oakland County CC No. 92-115814 FH

APPELLANT'S BRIEF

ORAL ARGUMENT REQUESTED

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TABLE OF CONTENTS

PAGE

INDEX TO AUTHORITIES CITED

CASES

STATUTES

OTHER AUTHORITIES

STATEMENT OF JURISDICTION

This Court entered an Order (46a) on November 28, 2001, granting Plaintiff-Appellant's application for leave to appeal from an Unpublished Per Curiam Opinion of December 19, 2000, of the Court of Appeals. (Holbrook, Jr. and McDonald, JJ., Wilder, P.J., dissenting). (37a - 44a). The Court of Appeals affirmed an Opinion And Order Granting Defendant's Motion To Dismiss (34a - 36a) of April 19, 1999, of the Honorable David F. Breck, Oakland County Circuit Court Judge. The Opinion And Order of the trial court dismissed the charges of two counts of Possession With Intent To Deliver Between 225 And 650 Grams Of Cocaine, MCL 333.7401(2)(a)(ii), against the Defendant-Appellee based upon a finding of entrapment. This Court in its order granting leave to appeal, directed the parties to brief the issue of whether this Court should adopt the federal subjective entrapment test.

STATEMENT OF QUESTIONS PRESENTED

I. WHETHER THE TRIAL COURT'S RULING THAT THE DEFENDANT-APPELLEE WAS ENTRAPPED WAS CLEARLY ERRONEOUS?

The trial court answered this question "No."

The Court of Appeals answered this question "No."

Plaintiff-Appellant answers this question "Yes."

Plaintiff-Appellee will answer this question "No."

II. WHETHER THIS COURT SHOULD ADOPT THE FEDERAL SUBJECTIVE ENTRAPMENT TEST?

The trial court did not answer this question.

The Court of Appeals did not answer this question.

Plaintiff-Appellant answers this question "No."

Defendant-Appellee will supply his own answer to this question.

STATEMENT OF FACTS

Defendant-Appellee Johnson, a police officer for the City of Pontiac, was charged in Oakland County Circuit Court with two counts of Possession With Intent To Deliver Between 225 and 650 Grams Of Cocaine, MCL 333.7401(2)(a)(ii). The Defendant moved to dismiss the charges based upon alleged entrapment. Oakland County Circuit Judge David R. Breck held an entrapment hearing on three different dates.

On June 10, 1998, Capt. Patrick McFalda of the Pontiac Police Department testified that in January of 1992, he was in charge of the vice crew of that department. On January 1, 1992, Capt. McFalda met and talked with Lemuel Flack at the Salvation Army building in Pontiac. (124a - 125a). Flack told Capt. McFalda and Capt. Pope that Flack, in a house owned by the Defendant, was selling crack cocaine with the Defendant's knowledge and consent. Flack told the officers that the Defendant had set up the operation, was providing protection and was running the operation. (125a - 126a). Flack said the Defendant was receiving money for doing that. Flack was in fear of his life at the hands of his suppliers because a doorman at the crack house had ripped off a bag of drugs. (126a - 128a). Flack pointed out the crack house and Capt. McFalda knew from his experience that it was a crack house. Capt. McFalda did a record check and determined that the house in question at 17 Florence was owned by the Defendant. (130a - 131a). Flack was given payments by the police during the investigation. (132a). Capt. McFalda was not aware of any financial problems of the Defendant. (133a).

Capt. McFalda testified further that in 1991 and 1992, the Defendant was a Pontiac police officer assigned as a youth officer. (133a - 134a). Based on his experience, Capt. McFalda knew the house at 17 Florence was a dope house. Lemuel Flack told Capt. McFalda that Flack

was paying $200 a day, or had paid $200 on seven occasions, to the Defendant so that Flack could sell drugs out of the Defendant's house. (134a - 135a). The money which Flack paid to the Defendant was not rent money, it was money to permit Flack to sell cocaine from the house. (135a - 136a). Flack told Capt. McFalda that the Defendant set him up in the house at 17 Florence to sell narcotics two months earlier. Flack had sold drugs from the house with the Defendant's knowledge and consent for two months. (136a). Flack had the Defendant's police department business card with a handwritten pager number on the back. (136a - 137a). The Defendant received $200 from Flack for each quarter ounce of drugs sold through the house at 17 Florence. (139a - 140a).

On June 3, 1998, the Defendant called Lt. Gregory Sykes of the Michigan State Police as a witness. Lt. Sykes testified that he was working as an undercover officer and was introduced to the Defendant Jessie Johnson by an informant named Lemuel Flack. Lt. Sykes had been told by Lemuel Flack that the Defendant was involved in crack cocaine houses in Pontiac and that Flack owed the Defendant money for selling crack cocaine out of the Defendant's house. Lt. Sykes presented himself as a narcotic distributor who was starting drug operations in Pontiac. (85a - 88a). Lt. Sykes went by the name Gregory Johnson. (86a). Lt. Sykes offered to hire the Defendant to protect Lt. Sykes against arrests and rip-offs. Lt. Sykes told the Defendant that a lot of money could be made. (61a - 62a). On February 7, 1992, the Defendant followed Lt. Sykes to a shopping plaza and stood by another vehicle while Lt. Sykes purchased drugs from another undercover officer. The purchase was for 10 ounces of cocaine. (64a - 66a; 72a). Lt. Sykes called the Defendant over and gave him the package of drugs. The Defendant was there to protect Lt. Sykes from any arrest or rip-off. (64a - 66a). The Defendant was to check the drugs

and ensure that the package was right. (74a). Lt. Sykes subsequently paid the Defendant for protecting him. (66a - 67a).

Lt. Sykes testified further that when he first met the Defendant, he gave Lemuel Flack some money to pay off a drug debt of Flack's to the Defendant. (70a - 71a). The Defendant told Lt. Sykes that the Defendant was in the process of establishing drug houses. (77a - 78a). Lt. Sykes told the Defendant that Lt. Sykes stood to make $50,000. (84a). By stipulation between the parties, a copy of a transcript of all the recorded conversations with the Defendant was admitted into evidence as People's Exhibit 1. A copy of Exhibit 1 is included in Appellant's Appendix. (195a - 288a).

Lt. Sykes testified further on cross examination that when he met the Defendant, Lt. Sykes went by the name of Gregory Johnson. The Defendant patted Lt. Sykes down because the Defendant knew that sometimes undercover officers would be wired with a transmitter. (86a - 87a). Lt. Sykes had been told by Lemuel Flack that the Defendant was involved in crack cocaine houses in Pontiac and that Flack owed the Defendant money for selling crack cocaine out of the Defendant's house. (87a - 88a). Lt. Sykes gave the Defendant $100 and a VCR to pay off Flack's drug debt. (89a). Lt. Sykes paid off Flack's drug debt because Flack was in fear of his life. (90a). The Defendant on a number of occasions told Lt. Sykes that he suspected that Lt. Sykes was a police officer. The Defendant had Lt. Sykes meet with him in the Pontiac Police Department to see if anyone recognized him. (90a). Lt. Sykes never met with the Defendant on a personal basis for drinks or dinner. Each meeting with the Defendant was to continue the investigation into drug trafficking. (90a - 91a). Lt. Sykes never offered the Defendant prostitutes or any type of sexual favors. (93a).

Lt. Sykes testified further that the Defendant participated in drug transactions with Lt. Sykes on February 7, 1992, and March 4, 1992. The Defendant was paid $1,000 by Lt. Sykes after each of those transactions. The Defendant's role was to protect Lt. Sykes against an arrest or a rip off. The Defendant was also to supply Lt. Sykes with information concerning raids by police on suspected crack houses. (92a - 94a). The street value of the 10 ounces of cocaine obtained in the February 7 delivery was $74,000. Given that value, Lt. Sykes did not consider the $1,000 paid to the Defendant to be excessive. (94a - 95a). The Defendant, a Pontiac police officer, never attempted to arrest Lt. Sykes for the two drug transactions. (95a - 96a). The Defendant never indicated that he did not want to assist in either of the drug transactions. Lt. Sykes asked the Defendant if he wanted to continue after the first drug transaction and the Defendant said he was ready to go. (96a; 103a). The Defendant told Lt. Sykes that he wanted to continue in the venture. (101a - 102a).

Lt. Lewis Langham of the Michigan State Police testified that he was the officer in charge of this case. Lt. Langham had been given information by Pontiac police that the Defendant was running a crack house at 17 Florence in Pontiac. (105a - 106a). Lt. Langham selected 10 ounces of cocaine for the first transaction as an amount that a person involved in selling drugs would do without bringing concern that Lt. Sykes was a police officer. (106a - 107a). Lt. Langham conducted the second drug transaction to eliminate the possibility that the first transaction was a one-time deal. (107a - 108a). The first transaction was for 280 grams of cocaine and the second transaction was for about 470 grams. (108a - 109a). The 280 gram package of cocaine was not put together by Lt. Langham. That cocaine was pre-packaged and came from the state police "reverse inventory" of seized cocaine. (110a). The purpose of the investigation was to determine from independent information that the Defendant was involved in

the drug trafficking business. (111a). The Defendant was willing to participate in the drug transactions, Lt. Langham just supplied the drugs. (112a).

Lt. Langham testified further on cross-examination that during the first drug transaction the Defendant was armed with a gun which he had partially out of his pocket. (113a - 114a). The second transaction was done to see if the first transaction was just done for some quick money. (115a). If the Defendant had not wanted to participate in a second transaction for $1,000, he would not have been offered more money to do so. (116a - 117a). The Defendant was never offered any sexual favors. Lt. Langham was not aware that the Defendant had any financial problems. (117a). The Defendant never attempted to arrest Det. Sykes or the other undercover officer. (T-I, 71-72).

The evidentiary hearing continued on July 29, 1998. The Defendant called Leon Flack as his final witness in the entrapment hearing. Leon Flack testified that he was the younger brother of Lemuel Flack. Leon was 37 years-old and Lemuel was 42 years-old. Lemuel and the Defendant went to high school together. (151a). In late 1991, both Leon and Lemuel were living in the house owned by the Defendant at 17 Florence. The Defendant was letting Leon Flack live there for free because Leon was remodeling the house for the Defendant. (151a - 152a). Leon Flack had worked for the Defendant in the past. (154a - 155a). Leon Flack knew that his brother Lemuel was using drugs at the house. Leon Flack never knew the Defendant to provide drugs to Lemuel Flack or to set up a drug house. (152a). Leon Flack had a prior armed robbery conviction and considered the Defendant to be his friend. (153a - 154a). After the testimony of Leon Flack, the Defendant rested. The People rested without calling any witnesses. (157). Following argument, the trial court took the matter under advisement. (194a).

On April 19, 1999, the trial court entered an Opinion And Order Granting Defendant's Motion To Dismiss. The trial court found that the Defendant had been entrapped by the conduct of the police. A copy of the trial court's Opinion And Order is included in Appellant's Appendix (34a - 36a). The People appealed as of right to the Court of Appeals from the trial court's Opinion And Order Granting Defendant's Motion To Dismiss. On December 19, 2000, the Court of Appeals entered majority and dissenting opinions. In the majority opinion, Judges Holbrook, Jr. and McDonald affirmed the trial court's finding of entrapment. In the dissenting opinion, Judge Wilder would have reversed the trial court's finding of entrapment. Copies of both the majority and dissenting opinions of the Court of Appeals are included in Appellant's Appendix. (37a - 44a).

Plaintiff-Appellant filed an application for leave to appeal to this Court. This Court entered an order (45a) on April 17, 2001, holding Plaintiff-Appellant's application for leave to appeal in abeyance pending this Court's decision in the case of People v Maffett, 464 Mich 878 (2001). This Court subsequently entered an order vacating its grant of leave in People v Maffett, supra, and denied leave to appeal in that case. People v Maffett, supra, 878. On November 28, 2001, this Court entered an order (46a) granting Plaintiff-Appellant's application for leave to appeal. This Court directed the parties to include among the issues to be briefed whether this Court should adopt the federal subjective entrapment test. Plaintiff-Appellant now files Appellant's Brief including the briefing of that issue.

ARGUMENT

I. THE TRIAL COURT'S RULING THAT THE DEFENDANT WAS ENTRAPPED WAS CLEARLY ERRONEOUS.

The Defendant, at the time a police officer for the City of Pontiac, was charged with two counts of possession with intent to deliver between 225 and 650 grams of cocaine. Following an evidentiary hearing, the trial court held that the Defendant had been entrapped by the conduct of police officers and dismissed the charges against him. **The standard of review for a trial court's ruling on the issue of entrapment is whether the decision of the trial court is clearly erroneous. People v Jamieson, 436 Mich 61; 93 (1990); People v James Williams, 196 Mich App 656; 661 (1992), lv app den 443 Mich 881 (1993).** The defendant has the burden of proving by a preponderance of evidence that he was entrapped. People v D'Angelo, 401 Mich 167; 182 (1977). The People submit that as set forth below, the record in this case establishes that the decisions of the trial court and of the majority opinion of the Court of Appeals are clearly erroneous.

This Court carefully considered the objective and subjective tests for entrapment and adopted the objective test in this Court's opinion in the case of People v Turner, 390 Mich 7 (1973). This Court reiterated its adherence to the objective test for entrapment in the cases of People v Jamieson, 436 Mich 61 (1990) and People v Juillet, 439 Mich 34 (1991). In Jamieson, supra, 660, this Court held that entrapment exists if the police engage in impermissible conduct that would induce a law-abiding person not willing to commit the crime to engage in criminal activity or if the conduct of the law enforcement officials is so reprehensible that it cannot be tolerated by a civilized society. In Jamieson, supra., this Court reversed the decisions of the trial

court and the Court of Appeals which had found entrapment and reinstated the charges against the defendants.

In People v Jamieson, supra., the defendants were Wayne County Jail guards who were charged with delivery of cocaine as a result of an undercover operation conducted in the Wayne County Jail. An inmate informant was involved. The inmate would arrange for an undercover officer to deliver drugs to a guard who then delivered the drugs to the inmate informant. The trial court found the undercover operation in Jamieson, supra., to constitute entrapment based upon reprehensible conduct of the police. The Court of Appeals affirmed the dismissals entered by the trial court. This Court reversed the decisions of the lower courts in Jamieson, supra., 93-94, and held that no entrapment had occurred.

This Court stressed in People v Jamieson, supra., 93-94, that the government's action did not induce criminal behavior, but only provided an opportunity for the defendants to engage in criminal activity. This Court specifically held that the furnishing of drugs by the government was not sufficient to induce an average person to commit a crime if the person was not ready and willing to commit it. People v Jamieson, supra., 89-90. This Court stressed that the undercover operation of the police did not rely upon human weakness, friendship or the use of authority to intimidate. People v Jamieson, supra., 93. Finally, this Court recognized that painstaking investigation is often required to uncover corruption in law enforcement. People v Jamieson, supra, 93.

This Court cited People v Jamieson, supra, with approval and reversed a finding of entrapment by the Court of Appeals in the case of People v Butler, 444 Mich 965 (1994). The opinion of the Court of Appeals finding entrapment is reported at People v Butler, 199 Mich App 474 (1993). In Butler, supra, an undercover officer sent out word on the streets that he had

cocaine to sell. The undercover officer also put out the number for his electronic beeper. One of the defendants paged the officer and several telephone conversations ensued. Eventually, a deal was put together for the defendants to purchase one half of a kilogram of cocaine. When the undercover officer met the defendants to consumate the deal, the defendants were arrested. The trial court denied the defendants' motion to dismiss based upon entrapment and the defendants were convicted by a jury of conspiracy to possess between 225 and 650 grams of cocaine. The Court of Appeals reversed the defendants' convictions finding that the police had instigated the crimes through a "fishing expedition" and that the conduct of the police went beyond the limit of acceptable conduct in ensaring a defendant. People v Butler, supra, 480-481.

This Court reversed the decision of the Court of Appeals and reinstated the defendants' convictions. This Court agreed with the trial court's determination that the reverse-buy operation conducted by the police did not constitute entrapment. This Court stated its ruling as follows:

> "This Court has previously held that undercover drug sales operations conducted by government officials are not indicative of entrapment per se. *People v Jamieson*, 436 Mich 61, 83 (1990) (BRICKLEY, J.). Further, as found by the trial court, nothing in the conduct of the government in this particular case rose to the level of entrapment. Law enforcement officials did nothing more than to present defendants with the opportunity to commit the crimes of which they were convicted"
>
> People v Butler, supra, 965-966

The Court of Appeals applied the Jamieson rationale to a factual situation analogous to the facts of the instant case in People v James Williams, 196 Mich App 656 (1992), lv app den 881 (1993). In Williams, supra., undercover officers stood in an identified area of high drug activity. When approached by individuals requesting cocaine, the undercover officers sold dime bags of crack cocaine to the defendants. The defendants were subsequently charged with possession of cocaine. Several trial judges dismissed the charges against the defendants based

upon findings of entrapment. The Court of Appeals reversed the decisions of the trial judges and reinstated the charges against the defendants based upon the decisions of this Court in People v Jamieson, supra, and People v Juillet, 439 Mich 34 (1991).

In People v Williams, supra, the Court of Appeals set forth a number of factors to consider in determining whether the government conduct would induce a law-abiding person to commit a crime. The Court stated those factors as follows:

> "Reviewing the issue under the first prong of this test, we analyze the following factors to determine whether the government activity would induce criminal conduct: (1) whether there existed any appeals to the defendant's sympathy as a friend; (2) whether the defendant had been known to commit the crime with which he was charged; (3) whether there were any long time lapses between the investigation and the arrest; (4) whether there existed any inducements that would make the commission of a crime unusually attractive to a hypothetical law-abiding citizen; (5) whether there were offers of excessive consideration or other enticement; (6) whether there was a guarantee that the acts alleged as crimes were not illegal; (7) whether, and to what extent, any government pressure existed; (8) whether there existed sexual favors; (9) whether there were any threats of arrest; (10) whether there existed any government procedures that tended to escalate the criminal culpability of the defendant; (11) whether there was police control over any informant; and (12) whether the investigation is targeted. Juillet, supra at 56-57. We examine the facts to determine whether the government activity would induce a hypothetical person not ready and willing to commit the crime to engage in criminal activity. Jamieson, supra at 80."
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> People v Williams, supra., 661-662.

The Court of Appeals applied the above factors to the facts in Williams, supra., and concluded as follows:

> "Turning to the second prong of the entrapment test, we reiterate that entrapment exists where 'the police conduct is so reprehensible that we cannot tolerate the conduct and will bar prosecution on the basis of that conduct alone.' Fabiano, supra at 531-532. We find that the police conduct in the cases at bar did

not run afoul of the basic fairness required by due process. Id. at 532.

> The purpose of the challenged police activity was the detection of crime, not its manufacture. Apart from furnishing an opportunity to commit a crime, the police did nothing improper. Moreover, the facts do not support the circuit court's suggestions that the police conduct aggravated the illegal use of drugs. The fact that the government supplied the cocaine is not reprehensible per se. Jamieson, supra at 88."
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> People v Williams, supra., 663.

The Court of Appeals in People v Williams, supra., reversed the trial courts' orders of dismissal and reinstated the charges against the defendants. This Court denied the defendants' application for leave to appeal. People v Williams, 443 Mich 881 (1993).

The Court of Appeals relied again upon this Court's decision in People v Jamieson, supra, in the case of People v Connolly, 232 Mich App 425 (1998). In Connolly, supra, an undercover police officer was attempting to sell a forty-nine pound bale of marijuana. The undercover officer gave one of the defendants two samples of the marjuana to "shop around." When a deal was negotiated for the sale of the marijuana, the defendants were arrested and charged with conspiracy to possess with intent to deliver marijuana. The trial court granted the defendants' motion to dismiss based upon entrapment. The trial court found the police conduct to be reprehensible in that the police conduct was a "fishing expedition" and put narcotics into society without any control. People v Connolly, supra, 428. The Court of Appeals reversed the decision of the trial court and held that no entrapment had occurred. The Court of Appeals noted that pursuant to MCL 333.7304(4), an undercover officer may distribute controlled substances in order to detect criminal activity. People v Connolly, supra, 430-431. The Court of Appeals held that the police conduct was not reprehensible and that no entrapment had taken place. People v Connolly, supra, 431-432.

The People submit that application of the factors set forth by this Court in People v Jamieson, supra., 89-94, and by the Court of Appeals in People v Williams, supra., 661-662, indicates that no entrapment occurred in this case. The record indicates no appeal to the Defendant's sympathy as a friend. The Defendant was not netted in a "fishing expedition." As set forth in Appellant's Appendix (125a - 140a), the police knew that the Defendant had previously allowed Lemuel Flack to sell drugs out of a house owned by the Defendant in return for a share of the drug profits. There were no long lapses between the beginning of the investigation and the Defendant's arrest. The undercover officer was introduced to the Defendant on January 22, 1992, two drug transactions took place and the Defendant was arrested on March 6, 1992. There were no unusual inducements to tempt a law-abiding citizen to commit a crime. Lt. Sykes testified that the payment made to the Defendant for his services was not excessive given the value of the drugs involved. There were no improper enticements such as sexual favors.

The record in this case also indicates that there were no illusions that the drug deals in question were not illegal. In fact, the Defendant's recorded conversations (195a - 288a) indicate that the Defendant was well aware that he was engaging in illegal activity. The testimony of Lt. Sykes and the Defendant's own statements indicate that the Defendant was ready and willing to participate in the drug transactions for profit and was not pressured into doing so by the undercover officer. There was an informant involved, but the informant was phased out of the investigation quickly. The Defendant participated in the drug transactions directly with the undercover officer.

The People also believe it is legally significant that the Defendant was a police officer. In this case, as this Court noted in People v Jamieson, supra, 93, the target of the undercover

operation was not unwary or vulnerable. Defendant Johnson, like the defendants in Jamieson, supra, was trained in law enforcement and sworn to uphold the law. Defendant Johnson voluntarily participated in the distribution of narcotics fully aware that such distribution was illegal. The Defendant made no effort to arrest or report the undercover officers who the Defendant believed to be drug dealers. As this Court stressed in People v Jamieson, supra, 93, corruption in law enforcement is a serious matter and often requires painstaking investigation to uncover.

The Defendant argued in the trial court that the police had the Defendant participate in the second drug transaction in order to escalate the Defendant's criminal culpability. Lt. Langham's uncontradicted testimony was that a second transaction is always conducted to make sure that the person is actually involved in the drug trade business and that the first transaction was not a one-time deal. (107a - 108a). It is also significant that the police did not attempt to increase the amount of cocaine involved in the second transaction to a higher statutory category.

Judge Wilder filed a well-reasoned dissenting opinion in the Court of Appeals in this case (41a - 44a). Judge Wilder's opinion noted correctly that the Per Curiam majority opinion ignored significant facts present in this case. As emphasized in Judge Wilder's opinion, the investigation of the Defendant, a police officer, was undertaken because the Defendant's superiors were advised that the Defendant was assisting Lemuel Flack in maintaining a drug house. Judge Wilder's dissenting opinion related those facts as follows:

> "The police investigation of defendant began after Lemuel Flack advised Captain Pat McFalda of the Pontiac Police Department that defendant, a police officer with the Pontiac Police Department, assisted Flack in operating a drug house from a home owned by defendant and rented by Flack. Flack told McFalda that defendant provided protection to Flack so that he could sell cocaine from the home, in exchange for money, but that he (Flack)

> owed money to defendant and as a result feared for his life. Flack's allegations were presented to the Michigan State Police, which assigned Lieutenant Gregory Sykes and Detective Lieutenant Lewis Langham to investigate.
>
> Flack introduced Sykes to defendant as a large narcotics distributor and Flack's supplier. At this meeting, defendant patted down Sykes looking for hidden microphones and told Sykes he was aware that undercover officers sometimes wore hidden transmitter wires and that he suspected Sykes might be a police officer. After this preliminary discussion, Sykes proposed that defendant might provide protection against theft of drugs delivered to Sykes, provide information about planned drug raids and protection against arrest, and provide protection for the establishment of other drug houses to operated by Sykes. Additional meetings were agreed to by defendant, however, defendant insisted that the next of these meetings be held at the Pontiac Police Station so defendant could see if any other Pontiac police officers recognized Sykes as a police officer." People v Johnson, 1-2, unpublished dissenting opinion of Wilder, P.J. (decided December 19, 2000, No. 219499) (41a - 42a).

Judge Wilder's opinion also correctly recognized the Defendant's prior involvement in the drug house and the significance of the Defendant's occupation of a police officer. Judge Wilder wrote as follows:

> "However, there was ample evidence on the record to establish that defendant was the owner of a known drug house and had previously participated in drug-related criminal activity. Although defendant did not participate in the actual sales or supply of drugs out of his home, testimonial evidence established that he provided protection to Flack who was selling drugs out of his home, and that defendant accepted money 'for looking the other way, knowing that the activity was taking place.' In this regard, the trial court's reliance on the fact that defendant never possessed, used or sold drugs prior to the staged drug buys is misplaced. Defendant's actions in providing protection for drug dealing would be sufficient to establish the charge of possession with intent to deliver cocaine as an aider and abettor, see *People v Sammons*, 191 Mich App 351, 371-371; 478 NW2d 901 (1991); *People v Lyons*, 70 Mich App 615, 617-618; 247 NW2d 314 (1976), and justify police investigation into the depth and extent of defendant's

criminal activity. See *Ealy, supra* at 511-512; *United States v Calva*, 979 F2d 119, 123 (CA 8, 1992) (police must be given some leeway to probe the depth and extent of a criminal enterprise).

* * *

Further, defendant's position as a police officer with the Pontiac Police Department at the time he committed the charged offense is an important fact deserving significant weight and consideration. Because he was a police officer, defendant had the authority and the duty to arrest both Flack and Sykes for the drug transactions that instead he provided protection for. In addition, because defendant was a police officer, Sykes had to take great care to conceal his own identity as a law enforcement officer. Fortunately, it is the rare drug suspect who can force a meeting to discuss future drug transactions in a police station as a means of attempting to expose the identity of the undercover officer, yet defendant was able to place Sykes and the operation at great risk because of his own position as a law enforcement officer. These actions by defendant clearly distinguish him from the otherwise law-abiding citizen contemplated by *Williams*. Defendant's investigation of Sykes to ensure that he was a 'legitimate' drug dealer clearly shows that he was willing to engage in the criminal activity as long as he believed he could successfully do so without detection. Defendant's position as a police officer also made him less susceptible to police coercion and pressure to participate in the criminal enterprise."

People v Johnson, supra, 3. (43a).

Finally, Judge Wilder correctly rejected the Per Curiam majority opinion's assertion that the conduct of the investigating officers in this case was reprehensible. Judge Wilder accurately assessed the investigating officers' conduct as follows:

"Turning to the second prong of the entrapment test, I disagree with the majority's conclusion that the police conduct in this case was reprehensible so as to establish entrapment. Defendant's agreement to be present at the drug transactions to provide protection, despite his sworn duty as a police officer to arrest the participants of that transaction, is significant evidence that he had no inclination to decline to participate. Significantly, between the February 7, 1992 and March 4, 1992 transactions, defendant was specifically asked whether he wanted to continue participation in the criminal enterprise and he stated his desire to

> continue. Thus, to the extent there was any escalation of the criminal enterprise it was done so with the express knowledge and agreement of the defendant.
>
> In *Ealy, supra* at 510, this Court rejected the defendant's argument that police conduct of selling escalated amounts of cocaine to defendant constituted entrapment, calling the conduct in that case 'good and proper police work.' The same description applies to this case. It cannot be overemphasized that Captain McFalda was presented with evidence of corruption by one of the Pontiac Police Department officers. The information presented to McFalda was that one of the officers in his department was not only looking the other way when drug transactions were occurring, but in addition the officer was being paid to provide confidential law enforcement information and other protection for the drug dealer. Not only did McFalda act correctly by referring the investigation to an outside agency, the State Police also was justified in utilizing a high level of governmental involvement in the undercover operation, including offering money for protection services, even if that level of involvement might not be justified in other circumstances. See *People v Jamieson*, 436 Mich 61, 91; 461 NW2d 884 (1990) (Brickley, J.) (difference in degree of governmental involvement is insufficient to establish reprehensible conduct where there is no evidence that the conduct created a risk that otherwise reasonable, lawabiding citizens will be enticed into violating the law)." (Footnote omitted).
>
> People v Johnson, supra, 4 (44a).

The People submit that Judge Wilder's dissenting opinion was factually accurate and legally correct that no entrapment occurred in this case.

The record in this case displays a Defendant who had been involved in a prior drug sale arrangement and who was ready and willing to help the undercover officer in drug transactions for financial profit. The fact that the police supplied the drugs in question does not constitute entrapment. People v Jamieson, supra, 88; People v Williams, supra, 663. The police conduct in this case did not induce an otherwise law-abiding person to commit a crime and was not so reprehensible that it cannot be tolerated. Indeed, the People submit that the conduct of the officers involved in this operation was altogether proper. Accordingly, the trial court erred by

finding entrapment in this case. This Court should reverse the decision of the trial court and reinstate the charges against the Defendant.

II. THIS COURT SHOULD NOT ADOPT THE FEDERAL SUBJECTIVE ENTRAPMENT TEST.

Summary Of Argument

This Court adopted the objective test for entrapment in People v Turner, 390 Mich 7 (1973). The objective test adopted by this Court had its roots in the concurring opinion of Justice Stewart in United States v Russell, 411 US 423 (1973). This Court's version of the objective test has been refined by this Court's decisions in People v D'Angelo, 401 Mich 167 (1977), People v Jamieson, 436 Mich 61 (1990) and People v Juillet, 439 Mich 34 (1991). The objective test has evolved in an accumulation of case decisions which have given guidance to the trial courts and law enforcement officials. This Court's version of the objective test considers both the conduct of the Government and the circumstances of the individual defendant. This Court should adhere to the objective test as set forth in People v Turner, supra, People v Jamieson, supra, and People v Juillet, supra, apply that test in this case and reverse the decisions of the lower courts finding entrapment.

A. Introduction

This Court in its order granting leave to appeal in this case directed the parties to brief the issue of "...whether this Court should adopt the federal subjective entrapment test." This issue was not raised or argued in the lower courts, so there is no standard of review for it. After careful consideration, the People urge this Court to retain the objective test for entrapment as set forth in People v Jamieson, supra, and not to adopt the federal subjective entrapment test.

B. The Subjective Test For Entrapment

The United States Supreme Court adopted what is generally referred to as the subjective test for the existence of entrapment in the case of Sorrells v United States, 287 US 435 (1932). In

Sorrells, supra, the defendant was prosecuted under the National Prohibition Act for selling a half-gallon of liquor to an undercover government agent for five dollars. The evidence indicated that the undercover agent initiated the request for the whiskey while reminiscing with the defendant about their mutual experiences as veterans of World War I. The defendant declined the agent's first two requests for the liquor, but went out and got the whiskey after the agent's third request. The trial court declined to give the jury an instruction concerning entrapment and the defendant was convicted.

The United States Supreme Court reversed the defendant's conviction and held that the defendant was entitled upon the evidence produced to present a defense of entrapment. The Supreme Court found the legal basis for the entrapment defense in statutory interpretation. The Court reasoned that Congress in enacting the National Prohibition Act did not intend it to apply when an innocent person was lured to commit an offense. Sorrells, supra, 448. The Supreme Court set forth the test for determining if entrapment had occurred as follows:

> "Objections to the defense of entrapment are also urged upon practical grounds. But considerations of mere convenience must yield to the essential demands of justice. The argument is pressed that if the defense is available it will lead to the introduction of issues of a collateral character relating to the activities of the officials of the Government and to the conduct and purposes of the defendant previous to the alleged offense. For the defense of entrapment is not simply that the particular act was committed at the instance of government officials. That is often the case where the proper action of these officials leads to the revelation of criminal enterprises, Grimm v. United States, 156 U.S. 604, 39 L. ed. 550, 15 S. Ct. 470, supra. The predisposition and criminal design of the defendant are relevant. But the issues raised and the evidence adduced must be pertinent to the controlling question whether the defendant is a person otherwise innocent whom the Government is seeking to punish for an alleged offense which is the product of the creative activity of its own officials. If that is the fact, common justice requires that the accused be permitted to prove it. The Government in such a case is in no position to object

> to evidence of the activities of its representatives in relation to the accused, and if the defendant seeks acquittal by reason of entrapment he cannot complain of an appropriate and searching inquiry into his own conduct and predisposition as bearing upon that issue. If in consequence he suffers a disadvantage, he has brought it upon himself by reason of the nature of the defense."
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> Sorrells v United States, supra, 451-452.

The Supreme Court concluded that the defense of entrapment existed not so that a guilty person could go free, but so the government could not prosecute a person when government agents instigated the crime. Sorrells, supra, 452. Justice Roberts' concurring opinion in Sorrells, supra, became the basis of the objective test for entrapment and will be discussed below.

The United States Supreme Court considered the test for entrapment again in the case of Sherman v United States, 356 US 369 (1958). In Sherman, supra, a government informant induced the defendant to sell him narcotics based upon pleas of sympathy and their mutual experiences as addicts. The Supreme Court found that the defendant had been entrapped as a matter of law because the defendant's crimes had been induced by the activity of law enforcement officials. Sherman, supra, 372-373. The Supreme Court reiterated the subjective test for entrapment as follows:

> "The principles by which the courts are to make this determination were outlined in Sorrells. On the one hand, at trial the accused may examine the conduct of the government agent; and on the other hand, the accused will be subjected to an 'appropriate and searching inquiry into his own conduct and predisposition' as bearing on his claim of innocence."
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> Sherman v United States, supra, 373.

The Supreme Court in Sherman, supra, rejected the objective test for entrapment advanced by Justice Roberts' concurring opinion in Sorrells v United States, supra. The Court stated that generally the issue of entrapment should be decided by the jury, not the trial court. Sherman,

supra, 377. Justice Frankfurter filed a concurring opinion in which he argued for adoption of the objective test for entrapment. Sherman, supra, 378-385.

The United States Supreme Court addressed the appropriate test for entrapment again in United States v Russell, 411 US 423 (1973). In Russell, supra, an undercover narcotics agent supplied the defendants with a chemical necessary for the manufacture of methamphetamine ("speed") in return for a portion of the resulting batch of drugs. The jury convicted the defendants, but the United States Court of Appeals reversed their convictions based upon a finding of entrapment. The United States Supreme Court in an opinion by Justice Rehnquist reinstated Defendant Russell's conviction because Russell had been predisposed to commit the offense and in fact had committed it in the past. The majority opinion in Russell, supra, rejected the defendant's argument that the Supreme Court should adopt the objective test for entrapment previously espoused by Justices Roberts and Frankfurter. The Supreme Court noted that the defense of entrapment was not of a constitutional dimension. Justice Stewart filed a dissenting opinion in which he would have adopted the objective test for entrapment.

The United States Supreme Court has continued to apply the subjective test for entrapment. The Supreme Court applied the subjective test in Hampton v United States, 425 US 484; 488-489 (1976) citing Sorrells, supra, Sherman, supra; and Russell, supra, with approval. Justice Brennan wrote a dissenting opinion in Hampton, supra, joined by two other justices, in which he would have adopted the objective test for entrapment. The United States Supreme Court most recently applied the subjective test for entrapment and found that the defendant was induced to commit the crime of obtaining child pornography through the mail in the case of Jacobson v United States, 503 US 540 (1992).

C. The Objective Test For Entrapment.

1. Federal Law

The objective test for entrapment has its roots in the concurring opinion of Justice Roberts in the case of Sorrells v United States. Justice Roberts opined that the trial court, not the jury, should consider the conduct of the government's informants and agents and make the determination whether such conduct instigated and induced the defendant's criminal acts. Justice Roberts stated his reasons for favoring the objective test as follows:

> "Whatever may be the demerits of the defendant or his previous infractions of law these will not justify the instigation and creation of a new crime, as a means to reach him and punish him for his past misdemeanors. He had committed the crime in question, but, by supposition, only because of instigation and inducement of a government officer. To say that such conduct by an official of government is condoned and rendered innocuous by the fact that the defendant had a bad reputation or had previously transgressed is wholly to disregard the reason for refusing the processes of the court to consummate an abhorrent transaction. It is to discard the basis of the doctrine and in effect to weigh the equities as between the government and the defendant when there are in truth no equities belonging to the latter, and when the rule of action cannot rest on any estimate of the good which may come of the conviction of the offender by foul means. The accepted procedure, in effect, pivots conviction in such cases, not on the commission of the crime charged, but on the prior reputation or some former act or acts of the defendant not mentioned in the indictment.
>
> The applicable principle is that courts must be closed to the trial of a crime instigated by the government's own agents. No other issue, no comparison of equities as between the guilty official and the guilty defendant, has any place in the enforcement of this overruling principle of public policy."
>
> Sorrells v United States, supra, 458-459.

Justice Roberts viewed the true foundation of the entrapment doctrine as being "...in the public policy which protects the purity of government and its processes." Sorrells, supra, 445.

Support for the objective test for entrapment appeared next in an opinion of the United States Supreme Court in the concurring opinion of Justice Frankfurter in Sherman v United States, supra. Three other justices joined in Justice Frankfurter's opinion. Justice Frankfurter first stated his understanding as to the reasons for the existence of the entrapment defense as follows:

> "The courts refuse to convict an entrapped defendant, not because his conduct falls outside the proscription of the statute, but because, even if his guilt be admitted, the methods employed on behalf of the Government to bring about conviction cannot be countenanced. As Mr. Justice Holmes said in Olmstead v United States, 277 US 438, 470, 72 L ed 944, 952, 48 S Ct 464, 66 ALR 376 (dissenting), in another connection, 'It is desirable that criminals should be detected, and to that end that all available evidence should be used. It also is desirable that the Government should not itself foster and pay for other crimes, when they are the means by which the evidence is to be obtained...[F]or my part I think it a less evil that some criminals should escape than that the Government should play an ignoble part.' Insofar as they are used as instrumentalities in the administration of criminal justice, the federal courts have an obligation to set their face against enforcement of the law by lawless means or means that violate rationally vindicated standards of justice, and to refuse to sustain such methods by effectuating them. They do this in the exercise of a recognized jurisdiction to formulate and apply 'proper standards for the enforcement of the federal criminal law in the federal courts,' McNabb v United States, 381 US 332, 341, 87 L ed 819, 824, 63 S Ct 608, an obligation that goes beyond the conviction of the particular defendant before the court. Public confidence in the fair and honorable administration of justice, upon which ultimately depends the rule of law, is the transcending value at stake."
>
> Sherman v United States, supra, 380.

Justice Frankfurter then stated his version of the objective test for entrapment as follows:

> "This does not mean that the police may not act so as to detect those engaged in criminal conduct and ready and willing to commit further crimes should the occasion arise. Such indeed is their obligation. It does mean that in holding out inducements they should act in such a manner as is likely to induce to the commission of crime only these persons and not others who would normally avoid crime and through self-struggle resist ordinary temptations. This test shifts attention from the record and

> predisposition of the particular defendant to the conduct of the police and likelihood, objectively considered, that it would entrap only those ready and willing to commit crime. It is as objective a test as the subject matter permits, and will give guidance in regulating police conduct that is lacking when the reasonableness of police suspicions must be judged or the criminal disposition of the defendant retrospectively appraised. It draws directly on the fundamental intuition that led in the first instance to the outlawing of 'entrapment' as a prosecutorial instrument. The power of government is abused and directed to an end of which it was not constituted when employed to promote rather than detect crime and to bring about the downfall of those who, left to themselves, might well have obeyed the law."
>
> Sherman v United States, supra, 383-384.

Justice Frankfurter echoed Justice Roberts' view that the issue of entrapment should be decided by the trial court, not the jury. Sherman v United States, supra, 385.

Justice Stewart was the next United States Supreme Court Justice to voice his support for the objective test for entrapment in his dissenting opinion in United States v Russell, supra. Two other justices joined in Justice Stewart's opinion. Justice Stewart stated his agreement with the earlier opinions of Justice Roberts and Justice Frankfurter and set forth his reasons for favoring the objective test as follows:

> "The concurring opinion of Mr. Justice Roberts, joined by Justices Brandeis and Stone, in the Sorrells case, and that of Mr. Justice Frankfurter, joined by Justices Douglas, Harlan, and Brennan, in the Sherman case, took a different view of the entrapment defense. In their concept, the defense is not grounded on some unexpressed intent of Congress to exclude from punishment under its statutes those otherwise innocent persons tempted into crime by the Government, but rather on the belief that 'the methods employed on behalf the Government to bring about conviction cannot be countenanced.' Sherman v United States, supra, at 380, 2 L Ed 2d 848. Thus, the focus of this approach is not on the propensities and predisposition of a specific defendant, but on 'whether the police conduct revealed in the particular case falls below standards, to which common feelings respond, for the proper use of governmental power.' Id., at 382, 2 L Ed 2d 848. Phrased another way, the question is whether--regardless of the

predisposition to crime of the particular defendant involved--the governmental agents have acted in such a way as is likely to instigate or create criminal offense. Under this approach, the determination of the lawfulness of the Government's conduct must be made--as it is on all questions involving the legality of law enforcement methods--by the trial judge, not the jury.

In my view, this objective approach to entrapment advanced by the Roberts opinion in Sorrells and the Frankfurter opinion in Sherman is the only one truly consistent with the underlying rationale of the defense." (Footnote omitted).

United States v. Russell, supra, 440-441.

Justice Stewart, as set forth above, believed that the issue concerning entrapment should be resolved by the trial court, not the jury. Justice Stewart also cautioned that the doctrine of entrapment did not prohibit the utilization of undercover officers and deceptive tactics by the Government. Justice Stewart stressed that the Government could offer a person the opportunity to commit a crime. Justice Stewart stated that facet of the objective entrapment test as follows:

"This does not mean, of course, that the Government's use of undercover activity, strategy, or deception is necessarily unlawful. Lewis v United States, 385 US 206, 208-209, 17 L Ed 2d 312, 87 S Ct 424 (1966). Indeed, many crimes, especially so-called victimless crimes, could not otherwise be detected. Thus, government agents may engage in conduct that is likely, when objectively considered, to afford a person ready and willing to commit the crime an opportunity to do so. Osborn v United States, 385 US 323, 331-332, 17 L Ed 2d 394, 87 S Ct 429 (1966). See also Sherman v United States, supra, at 383-384, 2. But when the agents' involvement in criminal activities goes beyond the mere offering of such an opportunity, and when their conduct is of a kind that could induce or instigate the commission of a crime by one not ready and willing to commit it, then--regardless of the character or propensities of the particular person induced--I think entrapment has occurred. For in that situation, the Government has engaged in the impermissible manufacturing of crime, and the federal courts should bar the prosecution in order to preserve the institutional integrity of the system of federal criminal justice." (Footnote omitted).

United States v Russell, supra, 445.

The United States Supreme Court split again concerning the objective and subjective approaches to entrapment in Hampton v United States, supra. Justice Brennan wrote a dissenting opinion, joined by Justices Stewart and Marshall, in which he argued in favor of the objective test. Justice Brennan stated his reasons for favoring the objective test as follows:

> "I joined my Brother Stewart's dissent in *United States v Russell*, 411 U.S. 423, 439, 93 S.Ct. 1637, 1646, 36 L.Ed.2d 366, 377 (1973), and Mr. Justice Frankfurter's opinion concurring in the result in *Sherman v United States*, 356 U.S. 369, 378, 78 S.Ct. 819, 823, 2 L.Ed.2d 848, 854 (1958). Those opinions and the separate opinion of Mr. Justice Roberts in *Sorrells v United States*, 287 U.S. 435, 453, 53 S.Ct. 210, 216, 77 L.Ed. 413, 423 (1932), express the view, with which I fully agree, that 'courts refuse to convict an entrapped defendant, not because his conduct falls outside the proscription of the statute, but because, even if his guilt be admitted, the methods employed on behalf of the Government to bring about conviction cannot be countenanced.' 356 U.S., at 380, 78 S.Ct., at 824, 2 L.Ed2d, at 855. The 'subjective' approach to the defense of entrapment--followed by the Court today and in *Sorrells*, *Sherman*, and *Russell*--focuses on the conduct and propensities of the particular defendant in each case and, in the absence of a conclusive showing, permits the jury to determine as a question of fact the defendant's 'predisposition' to the crime. The focus of the view espoused by Mr. Justice Roberts, Mr. Justice Frankfurter, and my Brother Stewart 'is not on the propensities and predisposition of a specific defendant, but on whether the police conduct revealed in the particular case falls below standards, to which common feelings respond, for the proper use of governmental power.' . . . Under this approach, the determination of the lawfulness of the Government's conduct must be made--as it is on all questions involving the legality of law enforcement methods--by the trial judge, not the jury. 411 U.S., at 441, 93 S.Ct., at 1647, 36 L.Ed.2d, at 378."
>
> Hampton v United States, supra, 495-497.

Justice Brennan, as set forth above, preferred to have the question of entrapment decided by the trial court. The United States Supreme Court's opinion in Jacobson v United States, supra, did not discuss the subjective-objective split as to the test for entrapment.

2. Michigan Law

This Court first directly addressed the "objective-subjective" question concerning entrapment in the case of People v Turner, 390 Mich 7 (1973). In Turner, supra, an undercover officer developed a friendship with the defendant over a three-year period. Through friendship and a false story about a girl friend who was an addict, the undercover officer convinced the defendant to deliver heroin to him on one occasion. Writing for the majority, Justice Swainson adopted the objective test for entrapment and found entrapment as a matter of law. Turner, supra, 22-23. Justice Swainson's opinion quoted extensively from Justice Stewart's concurring opinion in United States v Russell, supra, in explaining why he favored the objective test. Turner, supra, 19-21. Justice Swainson then stated his version of the objective test as follows:

> "This case demonstrates why an objective test is preferable to a subjective one. During the course of the trial, Trooper Ewers was very careful to insist that defendant offered to sell narcotics to him and insisted that he had never offered to buy any. In response to a question by defendant's counsel he stated that this was because he did not want to entrap the defendant. The use of the subjective test leads to a battle of semantics at trial over who said what first--the defendant concerned about admitting any evidence of 'predisposition' and the undercover agent afraid that stating the wrong phrase at the wrong time will lead to a finding of entrapment. It fails to focus on the real concern in these cases--whether the actions of the police were so reprehensible under the circumstances, that the Court should refuse, as a matter of public policy, to permit a conviction to stand.
>
> We agree with the position of Justices Roberts, Frankfurter, and Stewart of the United States Supreme Court and the view articulated by Justices MARSTON and CAMPBELL of our Supreme Court and adopt an objective test of entrapment in Michigan."
>
> People v Turner, 21-22.

Justice Williams filed a concurring opinion in Turner, supra. Agreeing that defendant Turner was entrapped, Justice Williams expressed his view that while the conduct of the police

was a major factor in determining whether entrapment occurred, that conduct should be considered in respect to the conduct of the defendant. Justice Williams stated his version of the objective test as follows:

> "As in so many cases that come before this Court, reasons and equity are not all on one side. The tension here is between two very valid reasons and equities. Justice SWAINSON, on the one hand, is rightly concerned about a rule which permits general evidence of defendant's 'bad reputation' to justify reprehensible police action. Justice T.E. BRENNAN, on the other, correctly observes that without some artifice the police seldom, if ever, would make the 'buy' necessary to prove the sale of heroin. I am sympathetic with both their concerns.
>
> It seems to me that Justice SWAINSON'S major objective could be achieved without looking only to the character of the police conduct, which I feel overlooks the fact that in most instances police conduct must be measured with respect to the conduct of the defendant. The police here in my mind would not have looked so bad if they had been coping with a known heroin pusher, let us say. What makes them look so bad is that they seem to have taken advantage of a rather unsophisticated 'innocent'.
>
> In my opinion it would be well to construe the phrase 'person otherwise innocent' more narrowly to refer to a person otherwise innocent of the specific type of crime charged. This would mean that police would have to prove, if properly challenged, that the defendant either had a prior record of crimes of the specific nature charged, had in this case for example made an offer to sell, actually had heroin, or some other matter destroying the concept that defendant was a person otherwise innocent of this type of crime.
>
> This proof may not be the easiest to get, but our common-law system has been able to work out most similar challenges or to change the rules accordingly."
>
> People v Turner, supra, 24-25.

Justice Williams thus envisioned a hybrid version of the objective test for entrapment in which the conduct of the Government was examined in the context of the individual defendant. Turner, supra, 23-25. Justice Coleman filed a dissenting opinion in Turner, supra, in which she cited the majority opinions of the United States Supreme Court in Sorrells v United States, supra,

Sherman v United States, supra, and United States v Russell, supra. Justice Coleman also seemed to favor a hybrid test for entrapment. Justice Coleman wrote as follows:

> "The broad interpretation of the entrapment defense as proposed by the majority opinion could block or interfere further with the efforts of police to apprehend and convict persons involved in the narcotics and dangerous drugs traffic.
>
> I cannot condone the one-eyed view which looks only at the police officer. I encourage the use of both eyes, the better to see and judge the total transaction.
>
> Defendant was caught but defendant was not entrapped."
>
> People v Turner, supra, 41-42

The defendant in People v Turner, supra, was tried in a bench trial and therefore the question did not arise as to whether the issue of entrapment under the objective test should be resolved by the trial court or the jury. That question was presented to this Court four years later in the case of People v D'Angelo, 401 Mich 167 (1977). This Court weighed the options of having the trial court or the jury decide the question of entrapment and in an opinion by Justice Ryan reached the following conclusion:

> "The policy considerations which moved us to adopt the objective test of entrapment compel with equal force the conclusion that the judge and not the jury must determine its existence. The thesis is that law enforcement conduct which essentially manufactures crime is a corruptive use of governmental authority which, when used to obtain a conviction, taints the judiciary which tolerates its use. It is a practice which relies for its success upon judicial indifference, if not approval, and it must be deterred. Its deterrence is a duty which transcends the determination of guilt or innocence in a given case and stands ultimately as the responsibility of an incorruptible judiciary."
>
> People v D'Angelo, supra, 173-174.

This Court also addressed in People v D'Angelo, supra, the issue of the burden of proof concerning the defense of entrapment. This Court concluded that a defendant should bear the burden of proving by a preponderance of the evidence that he or she was entrapped. People v

D'Angelo, supra, 182-183. Justice Williams filed a dissenting opinion in D'Angelo, supra, 184-185, in which he again expressed his view that the conduct of the Government should be measured with respect to the conduct of the defendant.

This Court considered the objective-subjective conundrum again in the case of People v Jamieson, 436 Mich 61 (1990). As set forth in Issue I of this brief, the factual situation in Jamieson, supra, is analogous to the facts of this case. The defendants in Jamieson, supra, were deputy sheriffs working as guards at the Wayne County Jail. The guards were receiving narcotics from an undercover officer outside the jail and then smuggling the drugs into the jail to the undercover informant who was an inmate. The trial court dismissed the charges against the defendants based upon entrapment and that decision was affirmed by the Court of Appeals. This Court, in a decision in which five opinions were filed, reversed the lower courts and held that no entrapment had occurred.

The lead opinion in Jamieson, supra, was written by Justice Brickley and was joined by Chief Justice Riley and Justice Boyle. Justice Brickley stated that under the objective test, entrapment occurs when Government conduct induces or instigates the commission of a crime by a person not ready and willing to commit it. Entrapment also occurs if Government conduct rises to an outrageous and reprehensible level which threatens the integrity of the judicial system. Jamieson, supra, 81-82. Government conduct is reprehensible if government agents have acted in a manner that is likely to instigate or create a crime. Jamieson, supra, 77-78. Significantly, Justice Brickley noted that as a practical matter the objective and subjective tests for entrapment overlap. Justice Brickley noted the existence of the overlapping of the two tests as follows:

> "As a matter of practicality, in many instances the application of the two theories overlap. When applying the subjective test, to determine if the accused is predisposed, the court

> must consider the official's conduct. Predisposition is linked to the amount of inducement and pressure offered by an agent as well as how long the agent persisted before commission of the illegal act. Similarly, courts applying the objective approach use the state of mind of the accused as a factor. When applying the objective test, consideration is given to the willingness of the accused to commit the act weighed against how a normally law-abiding person would react in similar circumstances. Under either approach, courts adhere to the fact that the function of law enforcement is to deter crime and not to manufacture it."
>
> People v Jamieson, supra, 74.

Justice Brickley therefore, described his version of the objective test as follows:

> "We are encouraged by the aforementioned indications that there is some overlapping in application between the two tests and that the best of each can, to some extent, be utilized."
> People v Jamieson, supra, 79.

Justice Brickley also set forth inducments which, if used by the Government, could indicate entrapment. Such measures included use of continual pressure, appeals to friendship or sympathy, threats of arrest, an informant's vulnerability, sexual favors and procedures which escalate criminal culpability. Jamieson, supra, 89. Justice Brickley's opinion specifically held that the furnishing of narcotics by the Government is insufficient to induce the commission of a crime by a person not ready and willing to commit it. Jamieson, supra, 89-90.

Justice Cavanagh filed a concurring opinion in People v Jamieson, supra. Justice Cavanagh indicated that ordinarily, under his version of the objective test for entrapment, the state of mind of the accused is not considered. Jamieson, supra, 94. However, under the unique facts of Jamieson, supra, the defendants being jail guards, the conduct of the Government was not reprehensible. Jamieson, supra, 95-97. Justice Griffin filed an opinion in which he concurred in the result reached by the Court. Justice Griffin would, however, have adopted a subjective test

for entrapment. Given the adherence of the Court to the objective test, Justice Griffin preferred Justice Brickley's version of that test.

This Court next considered the proper test for entrapment in the case of People v Juillet, 439 Mich 34 (1991). In Juillet, supra, this Court reviewed two separate cases, that of Mr. Juillet and that of Mr. Brown. The facts of neither of those cases are analogous to the factual situation in instant case. This Court in Juillet, supra, in four opinions, adhered to the objective test for entrapment. This Court found that Mr. Juillet had been entrapped and that Mr. Brown had not been entrapped. Justice Brickley wrote the lead opinion in Juillet, supra. Justices Riley and Griffin concurred in Justice Brickley's opinion. Justice Boyle filed a concurring opinion. Justice Boyle would have preferred to adopt a hybrid test for entrapment. Justice Boyle, however, concurred in Justice Brickley's version of the objective test as preferable to the versions set forth in the other opinions. Juillet, supra, 87.

Justice Brickley reviewed the history of the entrapment defense in Michigan and noted that is was intended to deter governmental conduct which instigated or manufactured a crime by a person not predisposed to commit it. Juillet, supra, 52. Justice Brickley again stated his adherence to the objective test for entrapment. Justice Brickley reiterated his version of the objective test as set forth in Jamieson, supra. Justice Brickley held that factors of both the objective and subjective tests should be considered to determine if entrapment occurred. Justice Brickley noted that the circumstances of the individual defendant should be considered. In that regard, Justice Brickley held as follows:

> "Under the *Jamieson* analysis, the court can review the circumstances of the defendant to determine whether the police conduct would induce a similarly situated person, with an otherwise lawabiding disposition, to commit the charged crime. The circumstances of the particular defendant may be considered

> by the trial court in analyzing the ready and willing component of the objective entrapment test, as we stated in *Jamieson*.
>
> * * *
>
> The trial court is entitled to consider the circumstances in which the defendant was situated in relation to the particular criminal charge brought by the prosecution. The court shall consider the effects of the police conduct upon a normally lawabiding person in the circumstances presented to the defendant, including potential vulnerability.
>
> * * *
>
> Therefore, we adhere to the belief that the individual defendant's circumstances are relevant in determining whether the police conduct rose to a reprehensible level." (Quotations from Jamieson omitted)
>
> People v Juillet, supra, 55-56.

Justice Brickley noted the same examples of factors which might indicate entrapment as in Jamieson, supra, and also set forth some additional examples. Such factors might include a long time lapse between the investigation and the arrest, inducements which would make commission of the crime unusually attractive to a law-abiding citizen, a guarantee that the acts were not illegal, the Government's control over any informant and whether the investigation was targeted or untargeted. Juillet, supra, 57. Justice Brickley noted again that the burden was on the defendant to prove entrapment by a preponderance of the evidence. The decision of the trial court is reviewed under the clearly erroneous standard. People v Juillet, supra, 61.

As indicated above, Justice Boyle concurred in Justice Brickley's version of the objective test for entrapment in order to establish a majority opinion. Justice Boyle in fact preferred a more definite blending of the objective and subjective tests. Justice Boyle described her preferred test of entrapment as follows:

> "However, because government conduct may be reprehensible, not only because it manufactures crime, but on the basis of the level of misconduct alone, I would embrace a dual view of entrapment that would bar prosecution because of truly reprehensible police conduct and would bar prosecution for conduct that instigates or manufactures crime. Government misconduct would be evaluated by focusing on police conduct. Government instigation would be evaluated subjectively by taking into account the defendant's circumstances and the interaction between the government agent and the defendant, and the trial court would determine both issues as a matter of law." (Footnote omitted).
>
> People v Juillet, 93-94.

Chief Justice Cavanagh also filed a concurring opinion in Juillet, supra in which he was joined by Justices Levin and Mallett. Chief Justice Cavanagh adhered to the objective test for entrapment, but disagreed with Justice Brickley's consideration of the character and circumstances of the individual defendant. Juillet, supra, 72.

This Court last considered the issue of entrapment in People v Maffett, 464 Mich 878 (2001). After briefs were filed and oral argument was held, this Court entered an order vacating its order granting leave to appeal. People v Maffett, supra, 878.

D. This Court Should Continue To Apply The Objective Test For Entrapment And Should Not Adopt The Federal Subjective Test For Entrapment.

The People submit that the objective test for entrapment as adopted in People v Turner, supra, and refined in People v Jamieson, supra, and People v Juillett, supra, has proved to be a fair and workable test for entrapment in Michigan.[1] In general, the trial courts have been able to apply the objective test and reach just results. The lack of cases since Jamieson, supra, and

[1] The People favor the objective test for entrapment over the subjective test. The People also, however, agree with Chief Justice Corrigan's dissent in People v Maffett, supra, 878-898, and with the amicus curiae brief of the Prosecuting Attorneys Association of Michigan that no valid legal basis exists for the entrapment defense in the absence of any action by the Legislature.

Juillet, supra, in which this Court has granted leave to appeal is indicative that the objective test has been a workable standard.[2]

It is noteworthy that the recent trend in state courts appears to be away from the subjective test for entrapment and toward the objective test. As noted by Justice Urbigkit in his dissenting opinion in Rivera v State, 846 P2d 1 (Wyo., 1993), at least thirteen states now have adopted by statute or caselaw some version of the objective test. See also Chambers, Case Note, United States v Jacobson, 44 Ark L Rev 502, n. 56. As set forth in Justice Urbigkit's opinion in Rivera, supra, and Justice Stewart's opinion in Russell, supra, the majority of commentators have also favored the objective test. La Fave Scott, Handbook On Criminal Law (1972) pp 371-373; The Entrapment Controversy (1976) 60 Minn, L. Rev. 163; 167, n. 13; Kamisar et al., Modern Criminal Procedure (4th ed. 1978 Supp) p 119; Comment, Entrapment In the Federal Courts, 1 U San Francisco L Rev 177 (1966); Williams, The Criminal Prosecution, 28 Fordham L Rev 399 (1959) and Cowen, The Entrapment Doctrine In The Federal Courts And Some State Court Comparisons, 49 J. Crim LCd PS 447 (1959).

The Model Penal Code (§ 2.13), has also incorporated a version of the objective test for entrapment. The Model Penal Code's proposed test for entrapment is as follows:

> "§ 2.13. Entrapment.
>
> (1) A public law enforcement official or a person acting in cooperation with such an official perpetrates an entrapment if for the purpose of obtaining evidence of the commission of an offense, he induces or encourages another person to engage in conduct constituting such offense by either:
>
> (a) making knowingly false representations designed to induce the belief that such conduct is not prohibited; or

[2] In excellent amicus curiae briefs, the Michigan Attorney General and the Prosecuting Attorneys Association of Michigan argue for the retention of the objective test for entrapment as set forth in in People v Jamieson, supra, and People v Juillet, supra.

(b) employing methods of persuasion or inducement that create a substantial risk that such an offense will be committed by persons other than those who are ready to commit it.

(2) Except as provided in Subsection (3) of this Section, a person prosecuted for an offense shall be acquitted if he proves by a preponderance of evidence that his conduct occurred in response to an entrapment. The issue of entrapment shall be tried by the Court in the absence of the jury.

(3) The defense afforded by this Section is unavailable when causing or threatening bodily injury is an element of the offense charged and the prosecution is based on conduct causing or threatening such injury to a person other than the person perpetrating the entrapment."

Model Penal Code, supra, § 2.13.

This Court gave sound reasons for adopting the objective test for entrapment in People v Turner, supra, 21-22. As set forth earlier in People v D'Angelo, supra, 174-175, this Court stressed that utilizing the objective test and having the issue of entrapment decided by the trial court was based upon sound policy considerations. Decisions by trial courts have led to an accumulation of case decisions which have given guidance to both the trial courts and law enforcement officials. Under the objective standard, the doctrine of entrapment has evolved and the objective test set forth in People v Jamieson, supra, and People v Juillet; supra, has proven to be a workable standard. Under the doctrine of *stare decisis*, this Court should continue to adhere to that standard.

Based upon the prior decisions of this Court, the People submit that the objective test for entrapment set forth below is a fair and legally sound test for the State of Michigan:

> A public law enforcement official or a person acting in cooperation with such an official commits an entrapment if he or she impermissibly manufactures or instigates the commission of a crime by a person not ready and willing to commit it. The trial court will make the determination whether entrapment occurred in a pretrial evidentiary hearing. In making that determination, the trial court shall consider the conduct of the Government and the circumstances of the individual defendant. The defendant bears the

> burden of proving entrapment by a preponderance of the evidence. The decision of the trial court is reviewed under the clearly erroneous standard.

The People submit that the objective test set forth above is an accurate statement as to the present state of the law in Michigan. The People have not included the second prong of reprehensible conduct because Government conduct which impermissibly manufactures and instigates criminal conduct by an innocent person is reprehensible. People v Jamieson, supra, 77-78; People v Juillet, supra, 42. Use of the word "reprehensible" is, therefore, redundant. The People urge this Court to retain the objective test for entrapment set forth in People v Turner, supra, Jamieson, supra, and Juillet, supra, to reverse the decisions of the lower courts and to remand this case to the trial court for trial upon the charged offenses.

RELIEF

WHEREFORE, David G. Gorcyca, Prosecuting Attorney in and for the County of Oakland, by Robert C. Williams, Assistant Prosecuting Attorney, respectfully requests this Honorable Court to reverse the decisions of the Oakland County Circuit Court and the Michigan Court of Appeals and to remand this case to the Oakland County Circuit Court for trial upon two counts of Possession With Intent To Deliver Between 225 And 650 Grams Of Cocaine, MCL 333.7401(2)(a)(ii).

Respectfully Submitted,

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PROSECUTING ATTORNEY
OAKLAND COUNTY

JOYCE F. TODD
CHIEF, APPELLATE DIVISION

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